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No. 91-71

In the Supreme Court of the United States

OCTOBER TERM, 1991

MING WAN LEUNG AND LAU CHING CHIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether DEA agents' entry of petitioners' hotel room under exigent circumstances contravened *Payton* v. *New York*, 445 U.S. 573 (1980).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 929 F.2d 1204.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 1991. Pet. App. 1a-9a. A petition for rehearing was denied on May 9, 1991. Pet. App. 21a. The petition for a writ of certiorari was filed on July 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner Ming Wan Leung (Ming) was convicted of conspiring to possess and distribute heroin, in violation of 21 U.S.C. 846 (Count 1), and traveling in interstate commerce with the intent to promote and facilitate narcotics offenses, in violation of 18 U.S.C. 1952 (Count 2). Petitioner Lau Ching Chin (Lau) pleaded guilty to both Counts 1 and 2 at the close of the government's case. Ming was sentenced to a total of 293 months' imprisonment and five years' supervised release. Ming C.A. App. 1A-4A. Lau was sentenced to a total of 210 months' imprisonment and five years' supervised release. Lau C.A. App. 1-4. The court of appeals affirmed. Pet. App. 1a-9a.

1. The evidence showed that a syndicate in New York ordered 45 kilograms of 83 percent pure heroin from Thailand. Delivery was to occur in Chicago, where the buyers would pay the courier $10,000 for his efforts. Payment for the shipment occurred between the principals. The Thailand National Police learned of the impending transaction and alerted the Drug Enforcement Agency. A DEA agent substituted for the original Thai courier. Pet. App. 2a.

Agent Hoang Ly, posing as the courier, checked into a Ramada Inn near O'Hare Airport in Chicago and called New York to notify the buyer. After Agent Ly spoke with petitioners' co-defendant Sa Mei Chen, the two agreed to talk a few hours later when someone who spoke English better than Sa would be available. The next time Agent Ly called, Sa turned the telephone over to petitioner Lau. After asking Agent Ly whether he had the "lucky money," Lau told Agent Ly that "her friends" would pick up

the heroin at noon the next day. She told Agent Ly that the $10,000 fee would be "no problem" and that he should expect to deliver the heroin to two Chinese. Pet. App. 2a.

Ly briefed the other DEA agents about what to expect during the pickup. Based on his 23 years of experience in the Asian heroin trade, Agent Ly told the agents that the Chinese would appear before the agreed pickup time, and that more than two would come. The leader, Ly thought, would linger in the background directing operations. The agents planted themselves around the hotel. Pet. App. 2a-3a.

Sa and Lau appeared in the lobby of the Ramada Inn between 3:00 a.m. and 3:45 a.m. the next day to reconnoiter. Lau called Agent Ly's room at 4:00 a.m. and instructed Agent Ly to meet him in the lobby at 4:45 a.m. After Agent Ly met Sa in the lobby, the two returned to Agent Ly's room, where Sa paid the $10,000 and Ly gave Sa the key to a locker containing the heroin. Agent Ly then called for a porter to move the locker to the car. That was the signal for the other agents, who closed in. Sa jumped out the window but was arrested in the parking lot. The agents then fanned out to find Sa's confederates. Pet. App. 3a.

Seeking petitioner Lau and any additional members of the team, the agents started canvassing nearby hotels. Agent Meyer arrived at a Holiday Inn at about 7:00 a.m. and learned from the night manager that he had earlier seen an Asian woman resembling Lau, and that two Asian men had checked into the hotel at about 3:00 a.m., arriving without reservations or luggage. They had taken two rooms, and both had listed New York City addresses on the registration cards. See Gov't C.A. Br. 11.

Meyer and another agent accompanied one of the motel's housekeepers to the room that had been assigned to the Asians earlier that night. The agents knocked on both doors and received no responses. Gov't C.A. Br. 11-12. The housekeeper then knocked on one of the doors and said that she wanted to clean. A woman opened the door. Agent Meyer recognized the woman, who turned out to be Lau, as one of the pair who had reconnoitered the lobby of the Ramada Inn. He yelled: "That's her." Lau tried to slam the door, but the agents forced their way in. One of the agents saw a shadow in the curtain and spotted petitioner Ming on construction scaffolding adjoining the balcony trying to escape. Agent Meyer followed Ming onto the scaffolding and, with help from other agents, returned him to the room. The agents searched the room and found $102,000 in cash, a mobile telephone, a pager, and notes containing the telephone number of a hotel in Bangkok and information Agent Ly had provided over the telephone when he talked to Lau in New York. An agent asked Lau how much money there was; Ming replied, "$100,000." Pet. App. 4a.

2. On appeal, petitioner Lau argued that her privately retained attorney rendered ineffective assistance of counsel by abandoning the issue of the warrantless entry and seizure of evidence from the room at the Holiday Inn.[1] Petitioner Ming similarly

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[1] Lau pleaded guilty under Fed. R. Crim. P. 11(e)(1) and accordingly waived her right to appeal the Fourth Amendment issues. In the district court, Lau's counsel had filed a motion to suppress, asserting that Lau had been arrested without a warrant or probable cause and that her hotel room had been searched "without a warrant, without consent, and without probable cause." Lau C.A. App. 20-21. Nevertheless, Lau claimed on appeal that her counsel improperly abandoned the issue of the validity of the entry into the hotel room by not

argued that his privately retained attorney rendered ineffective assistance by failing to file a motion to suppress both the evidence seized from the room at the Holiday Inn and his post-arrest statements. Ming C.A. Br. 14-34.

Rather than directly address the ineffective assistance claims, the court of appeals stated that "[i]t is simple to resolve the search, seizure and interrogation questions on the merits, and we accordingly do not decide whether the attack on the performance of counsel would be a sufficient way to smuggle these issues through the back door." Pet. App. 5a. The court then concluded that "[a]t each step the agents acted professionally, with ample foundation and within the bounds set by the Constitution." *Ibid.*

The court of appeals first found that the arrest entry at the Holiday Inn was reasonable. The court noted that Agent Ly had told the agents to expect more than two Chinese, and that the knowledge that a group of Asians, including a woman, arrived unexpectedly and without luggage at 3:00 a.m. at a Holiday Inn justified further investigation. The court further found that the agents properly used the ruse to see who would answer the door, and that Lau's appearance at the door provided probable cause to believe that the occupants of the room were involved in the heroin deal. The court emphasized that "no one, not even the housekeeper, entered the room until probable cause had been established." Pet. App. 6a. All the agents got from the ruse, the court observed, was a look at Lau's face, which she willingly exposed.

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mentioning it at the suppression hearing, and instead concentrating on the argument that the agents lacked probable cause to arrest her. Lau C.A. Br. 8-12.

> The tactics respected the privacy interests of the occupants, who could have elected not to answer the knock on the door. If someone other than Lau had opened the door, the agents would have departed, leaving the occupants undisturbed * * *. Innocent persons would have been fully protected; the agents' tactics were a threat only to the guilty.

Id. at 7a. The court also concluded that exigent circumstances justified the agents in taking action on probable cause, without awaiting a warrant. "Once the agents arrested Sa," the court commented, "it was only a matter of time before the others, expecting and not receiving a message, fled. The agents did not know where these others could be found, even who they were." *Ibid.* The court noted that if the agents had not acted quickly, the suspects might have escaped or evidence might have been destroyed. *Ibid.*

ARGUMENT

Petitioners claim that the DEA agents violated the Fourth Amendment by "gaining entry into a dwelling to effect an arrest through the use of a ruse." Pet. i, 5-10.

1. At the outset, we note that neither petitioner preserved this issue for review. Lau pleaded guilty and thereby waived her right to object to the seizure of the evidence on appeal, and Ming did not move in the district court to suppress the evidence seized as a result of the hotel room entry. As the court of appeals noted, the only issue presented on appeal was whether counsel's failure to raise and preserve those issues in the district court constituted ineffective assistance of counsel. We submit that, for the reasons set forth below and discussed by the court of appeals, the Fourth Amendment argument made by petition-

ers in the court of appeals was without merit. In any event, the Fourth Amendment argument was certainly not so compelling that it must be regarded as "gross incompetence" for petitioners' attorneys either not to raise the issue (in Ming's case) or to counsel abandoning it (in Lau's case) in favor of a plea of guilty. See *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 (1986).

2. Even if the Fourth Amendment issue were squarely presented here, petitioners' claim would be without merit. Petitioners place great weight on the assertion that the DEA agents improperly gained entry into the motel room by using a ruse. The agents, however, did not enter the room through the use of the ruse. Rather, the sole purpose of the ruse was to see who answered the door, and the only product of the ruse was a look at Lau's face, which she willingly exposed and in which she surely had no privacy interest. As the court of appeals put it, "[t]he tactics respected the privacy interests of the occupants, who could have elected not to answer the knock on the door. If someone other than Lau had opened the door, the agents would have departed, leaving the occupants undisturbed." Pet. App. 7a.

Because the ruse in this case was employed only to determine who would answer the door—and not to obtain entry into the room to make an arrest—the result in this case follows *a fortiori* from *Lewis* v. *United States*, 385 U.S. 206 (1966). In *Lewis*, an undercover narcotics agent obtained entry into the house of a drug dealer by posing as a buyer of narcotics. This Court held that the police conduct did not violate the Fourth Amendment. As the Court stated, "it has long been acknowledged * * * that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the

identity of its agents." *Id.* at 208-209. If the agent's use of a ruse to obtain entry into the dealer's house in *Lewis* was permissible, the use of the ruse in this case merely to determine who, if anyone, would open the door of the motel room was certainly permissible as well.

3. Petitioners' contention that the court of appeals' decision in this case contravenes *Payton* v. *New York*, 445 U.S. 573 (1980), is mistaken. As petitioners recognize (Pet. 6-7), *Payton* held that, *absent exigent circumstances*, the Fourth Amendment prohibits the police from making a warrantless entry into a suspect's home to make a felony arrest. 445 U.S. 587-588, 590. Because the agents' entry in this case was based on exigent circumstances, the court of appeals correctly held that their entry did not violate *Payton*.[2]

The court of appeals' fact-bound conclusion that there were exigent circumstances is amply supported by the record in this case. As this Court stated last Term in *Minnesota* v. *Olson*, 110 S. Ct. 1684 (1990), a court "applie[s] essentially the correct standard in determining whether exigent circumstances existed" in inquiring whether a warrantless entry is justified by, *inter alia*, "imminent destruction of evidence" and "the need to prevent a suspect's escape." *Id.* at 1690.[3] In this case, once the agents arrested

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[2] Contrary to petitioners' contention (Pet. 8), the government did not argue, and the court of appeals did not find, any "'consent' to entry" by Ming and Lau. The agents entered the room based on exigent circumstances, not consent. *Riddick* v. *United States*, 445 U.S. 573 (1980) (the companion to *Payton*), is thus of no help to petitioners.

[3] This Court also added that "the gravity of the crime and the likelihood that the suspect is armed should be considered." *Olson*, 110 S. Ct. at 1690. In that regard, we note that the

Sa, it was only a matter of time before Sa's confederates, expecting and not receiving a message, destroyed the remaining evidence and fled.[4] Once the agents recognized Lau as the person whom they had seen in the lobby of the Ramada Inn, it was doubly important that they work quickly. As Ming's flight shows, petitioners could have escaped from the back of the motel while agents guarded the front. Moreover, it was impossible to know what evidence would have been destroyed if the officers had attempted to barricade the doors to the room while sending for a

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heroin involved in this case had a street value of up to $31 million. Gov't C.A. Br. 5, citing Tr. 159, 179, 590. And "it has uniformly been recognized that substantial dealers in narcotics possess firearms and that such weapons are as much tools of the trade as more commonly recognized drug paraphernalia." *United States* v. *Payne*, 805 F.2d 1062, 1065 (D.C. Cir. 1986).

[4] See *United States* v. *Marin-Cifuentes*, 866 F.2d 988, 991-992 (8th Cir. 1989) (finding that exigent circumstances justified warrantless arrest in hotel room where remaining co-conspirators, who were in close contact with remaining conspirator, had just been arrested; "[i]t would have been foolhardy to not make the arrest of Quitian at the same time to avoid the destruction of evidence or risk the chance of flight"); *United States* v. *Newbern*, 731 F.2d 744, 748-749 (11th Cir. 1984) (exigent circumstances existed justifying warrantless entry of motel room to effect arrest where members of the conspiracy remained at large, leading to the potentially dangerous situation of having other co-conspirators arrive on the scene and join the motel room occupants); *United States* v. *Manfredi*, 722 F.2d 519, 522 (9th Cir. 1983) (upholding warrantless arrest in hotel room, and noting that failure of emissary in drug deal to return as expected would "inevitably" alarm those waiting for his return).

warrant. Thus, there was no practical alternative to entering the room to make the arrests.[5]

At bottom, petitioners' contention reduces to the assertion that the agents manufactured exigent circumstances in order to avoid the requirements of *Payton*. For the reasons stated above, the facts of this case belie that contention. At the time the ruse was undertaken, the agents were investigating who might be in the room, did not have probable cause to obtain a warrant, and did not have the time to plant themselves outside the room and wait indefinitely for the inhabitants to show their faces. Most of the exigent circumstances already existed, and the additional urgency caused by Ming's flight was caused not by an attempt to circumvent *Payton*, but as a result of a legitimate investigative technique. See *United States* v. *Zabare*, 871 F.2d 282, 289-290 (2d Cir.), cert denied, 493 U.S. 856 (1989) (rejecting argument that circumstances are not "exigent" if appropriate method of investigation gives rise to exigency).

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[5] The court of appeals' decision does not conflict with *United States* v. *Johnson*, 626 F.2d 753 (9th Cir. 1980), aff'd on other grounds, 457 U.S. 537 (1982). In *Johnson*, two Secret Service agents approached Johnson's house, knocked on the door, and misrepresented their identities. When Johnson answered, both had their guns drawn and requested admission. 626 F.2d at 755-757. Unlike in this case, there were no exigent circumstances in *Johnson*, and the agents had ample time to obtain a warrant before going to Johnson's house. *Id.* at 755.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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